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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF ENFORCEMENT

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MEMORANDUM

SUBJECT: New Criminal Enforcement Responsibilities Under 1990 Clean Air Act Amendments

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TO: Regional Criminal Enforcement Counsels, I - X
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I. INTRODUCTION

The 1990 Clean Air Act Amendments (Pub.L. 101-549, November 15, 1990, 104 Stat. 2399), which became effective on November 15, 1990, will have a significant impact upon the number and types of Clean Air Act criminal investigations. The primary focus of criminal cases under the prior CAA was upon violations of the National Emission Standards for Hazardous Air Pollutants (NESHAP) regulations governing asbestos removal procedures.

Regulations pursuant to the 1990 Clean Air Act Amendments (the 1990 Act) are now final as to certain aspects of this legislation. Others will likely be emerging from the regulatory pipeline in an accelerated pace. CAA criminal cases will inevitably extend beyond the present realm of asbestos violations and involve groundbreaking and challenging investigations and prosecutions of new statutory provisions and their progeny regulations. The CAA was, and indisputably remains, the most complex of the environmental statutes administered by the Agency. A detailed understanding of the CAA regulatory schemes may only be required in the context of specific investigations. Nonetheless, it is imperative that those involved in the criminal enforcement program be conceptually aware of these regulatory developments in order to identify new areas appropriate for criminal enforcement. Networking with air program personnel is essential to facilitate expanded criminal enforcement in this area.

II. ENHANCED CAA CRIMINAL ENFORCEMENT PROVISIONS

The enhanced criminal enforcement provisions of the 1990 Act are summarized below. (The United States Code and CAA cite

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for the enforcement provision of the CAA is CAA § 113, 42 U.S.C. § 7413 et seq. A copy of this section is attached. Subsequent CAA cites are found in the end notes.)

(1) The 1990 Act added a felony, punishable by up to five years of imprisonment, for various knowing violations, including violations of NESHAP standards, state implementation plans, new source performance standards, stratospheric ozoneprotection, and acid rain control requirements, emergency orders, and any rule or permit issued pursuant to the CAA.[1]

(2) The 1990 Act added a felony, punishable by up to two years imprisonment, for knowing falsification of records or failure to report, or tampering with monitoring equipment.[2] The legislative history indicates that this provision is not intended to penalize "inadvertent errors". For criminal sanctions to apply, a source owner or operator must be on notice of the record-keeping, information, or monitoring requirements in question, 1990 Cong. & Admin. News 3867.

(3) The 1990 Act added a felony punishable by up to fifteen years of imprisonment for the knowing release of certain hazardous air pollutants that knowingly endangers a person.[3]

(4) The 1990 Act added a misdemeanor, punishable by up to one year of imprisonment, for the negligent release into the ambient air of either CAA enumerated hazardous air pollutants or hazardous substances designated pursuant to Section 302 of the Emergency Planning and Community Right-To-Know Act (42 U.S.C. § 11002) that negligently endangers a person.[4]

(5) The 1990 Act added a misdemeanor, punishable by up to one year imprisonment, for knowingly failing to pay a fee owed the U.S. under the CAA.[5]

(6) Lastly, the 1990 Act added a citizen award provision for information leading to a criminal conviction, a judicial or administrative civil penalty.[6]

III. THE ELEMENT OF CRIMINAL INTENT

Some nuances of these 1990 Act provisions warrant special mention, raising issues which counsel and Special Agents need to consider. First, new language concerning the definition of "operator" affects criminal liability.[7] Owners and operators of stationary sources are assigned specific compliance responsibilities with regard to certain CAA provisions, such as

hazardous air pollutants and new stationary source standards of performance.[8] Congress wanted criminal responsibility of an owner or operator to be limited to senior management and corporate officers, except in instances where the criminal violation was of a "knowing and willful" magnitude of intent. Accordingly, the term "operator" was clarified to explicitly include senior management personnel and corporate officers. Excluded as "operators", except in those instances of "willful and knowing" violations, are lesser employees who are:

(1) stationary engineers or technicians responsible for the operation, maintenance, repair, or monitoring of equipment and facilities, and

(2) who often have supervisory and training duties, but who are not senior management or a corporate officer.

New language in CAA § 113(h), 42 U.S.C. § 7413(h), qualifies the general CAA definition of "person" for purposes of criminal enforcement.[9] First, the section provides that only for purposes of the CAA negligent endangerment offense, a person cannot be convicted for a violation if:

(1) it occurred as part of the employee's (undefined) "normal activities" as an employee; and

(2) the employee was not a part of senior management or a corporate officer.

For purposes of all other CAA criminal subsections, an employee cannot be convicted unless the government can prove;

(1) the criminal violation was either committed "knowingly and willfully"; OR

(2) if the violation was committed only "knowingly," the defendant can avoid conviction if it is established:

(a) that the violation occurred as part of his "normal activities"; and

(b) that he was "acting under orders from the employer."[10]

The statutory history of the 1990 CAA addressed the matter of knowledge derived from self-audits. House Conference Report No. 101-952 recommended that the CAA criminal penalties not be applied in a situation where a person, acting in good faith, promptly reports the results of an audit and promptly acts to correct any deviation. It stated, "Knowledge gained by an individual solely in conducting an audit or while attempting to correct any deficiencies identified in the audit or the audit

report itself should not ordinarily form the basis of the intent which results in criminal penalties." 1990 Cong. & Admin. News 3879.

IV. STATUS OF IMPLEMENTING THE 1990 CAA AMENDMENTS

It is more effective in understanding the criminal enforcement aspects of the 1990 Act to focus on the amendments in the context of the pertinent subject matters as addressed by the CAA:

Subchapter I, Part A, which concerns air quality and emission limitations;
Subchapter II, which governs mobile sources;
Subchapter IV, which concerns acid rain;
Subchapter V, which sets out the permit program; and
Subchapter VI, which concerns stratospheric ozone protection.[11]

A. SUBCHAPTER I: Air Quality Standards

The CAA Subchapter, Part A (Title I), entitled: "Air Quality and Emission Limitations" warrants special criminal enforcement attention.[12] There are three important subject covered here: state implementation plans, standards of performance for stationary sources, and hazardous air pollutants.

1. State Implementation Plans: The 1990 Act allows EPA to define the boundaries of "nonattainment" areas and classify them according to the severity of the geographical area's air pollution problems. States must establish state implementation programs (SIPs) toward the attainment of National Ambient Air Quality Standards (NAAQS) for the state's nonattainment areas. Note that the CAA provides that any SIP requirement in effect as of November 15, 1990 remains in effect until revised.[13] Congress indicated an awareness that the 30-day notice of SIP violation requirement should be inapplicable to criminal actions since such notice would provide an opportunity for violators to frustrate the purposes of the Act, for example, by leaving the jurisdiction or by destroying evidence, 1990 Cong. & Admin. News 3747. Nonetheless, the notice language remained in the conference committee bill and ultimately in the CAA as enacted.[14]

2. Standards for Stationary Sources: The most immediate impact of the 1990 Act as to criminal enforcement in this area is the five-year felony penalty provided for violations of new stationary source standards of performance where formerly only misdemeanor sanctions were available[15]

Although EPA may delegate authority to the states to enforce performance standards, the EPA retains concurrent authority to enforce these standards.[16] Regulations governing specific

stationary sources (over 70 different types of economic activity have standards of performance), are set out at 40 C.F.R. Part 60. Congress enacted a new provision mandating that performance standards be set for solid waste incinerators and that such standards be incorporated into their operating permits.[17] Of equal importance is the two-year felony now available for knowing falsification of required compliance monitoring data and tampering with monitoring equipment since self-reporting will be a large part of CAA compliance monitoring.[18]

3. Hazardous Air Pollutants: Title III of the 1990 Act specifically named 189 hazardous air pollutants ("HAPs"), which will be the subject of national emission standards (NESHAPs).[19] Extensive regulations dealing with source categories of these pollutants are in the process of being issued and finalized.[20] Note that although states may seek delegation of authority to enforce these type of federal requirements, EPA also retains clear authority to federally enforce HAP emission standards.[21] States may implement their own programs, but they must be at least as stringent as federal requirements.

The objective of the HAP regulations is to identify maximum achievable control technology (MACT) through a process of regulatory development involving the regulated and environmental community and the Agency. If EPA judges that it is not feasible to prescribe or enforce an emission standard for a designated HAP, EPA may require, akin to the asbestos work practice regulations, a work practice standard involving a specified design, equipment, work practice, or operational standard or some combination thereof.[22] This further clarifies the government's basis to enforce work practice standards in lieu of emissions standards, which had been an issue of contention in asbestos NESHAP enforcement cases.

B. SUBCHAPTER II: Motor Vehicles and Fuels

CAA Subchapter II (Title II), titled, "Emission Standards For Moving Vehicles," deals with motor vehicles (mobile sources) and fuels.[23] Although the focus is primarily on motor vehicles, EPA is authorized to also issue regulations governing emissions from nonroad engines and vehicles such as chain saws, dirt motorcycles, and lawn mowers.[24]

The 1990 Act continued the exclusion of Subchapter II violations from criminal penalties.[25] However, related violations may warrant criminal enforcement consideration. For instance, the 1990 Act set stringent requirements for the sulphur content of motor vehicle diesel fuels and the benzene content of motor vehicle gasoline.[26] Refiners and blenders will be required to certify that their fuels meet such standards. Previously, falsifications of such certifications were prosecuted as violations of the general false statement criminal provision of

Title 18.[27] Now, they can be prosecuted on the basis of the enhanced (a two year felony versus the old maximum of six months imprisonment) false certification provision, which applies to all CAA reporting and recordkeeping requirements.[28]

Automobile dealer or repair shop tampering with automotive air emission systems still can not be prosecuted criminally under the CAA since the mobile source regulations impose various compliance certification responsibilities only on automobile manufacturers and not on the dealers.[29] But note that dealers and repair shops can be prosecuted, as discussed below, for failing to comply with the new CFC air conditioning regulations.

C. SUBCHAPTER IV: Acid Rain

The 1990 Act added a new Subchapter IV (Title IV) concerning the acid rain problem titled, "Acid Deposition Control."[30] Through a system of allowances for the sulfur dioxide emissions from utilities, as well as requirements intended to reduce nitrous oxide emissions from boilers, the 1990 Act was designed to rectify the acid rain problem. An eventual overall national limit (8.90 million tons) for the emission of sulfur dioxide is set by statute.[31]

Each utility is issued an annual allotment of allowances and has the option of either lowering their sulphur emissions for covered plants to meet their limit or of purchasing additional "allowances" (one allowance equals authority to emit one ton of sulfur dioxide) to cover emissions in excess of what is allotted for the plant. Starting in 1995, 261 power plant units will be covered and by the year 2000, smaller power plants, and other sources will be covered. Not holding allowances for any excess will cost a source $2,000 per ton of excess emission. If a utility emits lower emissions than it is allotted, it can either bank the difference between its allotment and its actual emissions in order to cover future excesses or can sell these earned allowances on the open market. The authority to auction allowances, starting in March 1993, has been officially delegated by EPA to the Chicago Board of Trade. The final acid deposition control regulations were published in the Federal Register on January 11, 1993.

The financial incentive for falsification of emission and other data under this new scheme is clearly heightened. Such fraudulent violations are within the CAA felony prohibition against knowingly making any false material statement or omitting material information from any CAA document required by EPA or a state to be maintained or filed.[32]

D. SUBCHAPTER V: Operating Permits

A major change in the CAA were the 1990 amendments adding

the new CAA Subchapter V (Title V), "Permits," which established an operating permits program to incorporate all applicable CAA regulatory requirements.[33] The CAA's permitting program will be similar to the CWA's NPDES permitting program, which has been the source of many good criminal cases. A CAA permit may incorporate HAP emission, as well as acid rain and NAAQS SIP requirements. Air pollution sources subject to the program must obtain five-year permits from the state permitting authority and will have to provide compliance certifications signed by "a responsible official".[34] The certifications will state that "based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete."[35]

Enforcement focus will shift from the SIPs to violations of specific permit conditions by permit holders since the permit will collect in one document all of a source's obligations under the CAA. The final regulations prescribing the structure and procedures for delegated state permit programs have been finalized. They were published in the Federal Register on July 21, 1992 and will be codified in 40 CFR Part 70. The states are now in the process of establishing permit programs. They have until November 15, 1993 to submit their programs for EPA approval and EPA is allowed a one year review period.[36] When these programs become operational, more extensive guidance on their enforcement implications will be issued.

As noted above, a 30-day notice of violation to the state and person is a prerequisite for criminal enforcement of a violation of a SIP. However, since such notice is not required for criminal enforcement of a permit condition, a violation of a SIP requirement can be criminally prosecuted without such notice if it is incorporated as a condition of the permit. In contrast, a notice of a violation is required to bring an administrative or civil enforcement action for a violation any permit condition.[37]

E. SUBCHAPTER VI: Stratospheric Ozone Protection

The last major section of the CAA added in 1990 was designed to deal with remedying the depletion of the stratospheric ozone layer. The objective of this Subchapter VI (Title VI) is to phase out use and production of ozone depleting substances, including chlorofluorocarbons (CFCs) and any other substances that the Administrator finds causes significant harmful effects on the stratospheric ozone layer.[38] The CFC regulatory program will be akin to the TSCA regulatory program to eliminate PCBs from the environment. There are CFC labeling regulations (published in the Federal Register on February 11, 1993), regulations for recycling motor vehicle CFCs (issued on July 14, 1992), and for residential and commercial appliances (to be issued by the end of April 1993), and safe disposal regulations are in the process of being finalized by the Agency.[39]

CAA § 608, 42 U.S.C. § 7671g, governs the release of regulated refrigerants in the course of maintenance, service, repair, or disposal of appliances or industrial process refrigeration. Proposed regulations implementing Section 608 were published on December 10, 1992. The first step of what is designated the National Recycling and Emission Reduction Program is the statutory prohibition, as of July 1, 1992, of the knowing venting of ozone depleting refrigerants from appliances and industrial process refrigeration systems into the environment.[40] The Interim Enforcement Guidance on this prohibition, which is attached, sets out factors in identifying possible knowing violations of CAA Section 608(c). Although this section prohibits the disposal of CFCs "in a manner which permits such substance to enter the environment," the disposal of refrigerators or other appliances containing ozone depleting refrigerants will not be the subject of enforcement actions until appropriate regulations are issued.

Motor vehicle air conditioners are addressed by a separate CAA provision.[41] As part of this statutory scheme, regulations have been issued governing the servicing of automotive air conditioners.[42] The object of the regulations is to prevent the release to the environment of refrigerants used in motor vehicle air conditioners (MVACs) that contain CFCs in either a liquid or gaseous state. Accordingly, the regulations require all persons who are paid to perform service ("do-it-yourself" repairs are excluded) on MVACs to use EPA approved recovery equipment so that the refrigerant can be contained and can be sent off-site for reclamation or recycled on-site. Technicians working on MVACs are required to be trained and certified as to the proper use of approved refrigerant recycling equipment. Each MVAC facility will have to certify to EPA that their training and equipment meets applicable regulatory standards.

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ENDNOTES:

1. CAA § 113(c)(1), 42 U.S.C. § 7413 (c)(1).

2. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2).

3. CAA § 113(c)(5), 42 U.S.C. § 7413(c)(5).

4. CAA § 113(c)(4), 42 U.S.C. § 7413(c)(4).

5. CAA § 113(c)(3), 42 U.S.C. § 7413(c)(3). See also CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1), which makes it a felony offense to knowingly violate a requirement for the payment of any fee owed the U.S. under the CAA.

6. CAA § 113(f), 42 U.S.C. § 7413(f).

7. CAA § 113(h), 42 U.S.C. § 7413(h).

8. CAA § 112, 42 U.S.C. § 7412, which includes NESHAPs and CAA § 111, 42 U.S.C. § 7411, which deals with stationary sources.

9. CAA § 302(e), 42 U.S.C. § 7602(e).

10. In other words, if the government can prove the violation was knowing and willful, it does not have to negate either of these two elements. But if proof shows only a knowing violation, then a factual issue arises involving whether the commission of the crime was pursuant to company orders and whether such environmental misconduct was part of the defendant's normal work routine.

    It has not been uncommon for defendants to offer such arguments to justify environmental wrongdoing. The 1990 Act represents an instance where Congress gave statutory recognition to such issues. The practical effect of this new language will have to await judicial interpretation since the terms "knowing" and "knowing and willful" are not defined in the United States criminal code, but are distinguished through extensive case law.
    The terms "knowing and willful" have been interpreted in the context of other federal statutes (for instance, the odometer tampering statute, 15 U.S.C. § 1990(a)) and the Presidential threat statute, 18 U.S.C. § 871, as meaning an intentional violation of a known legal duty, United States v. Studna, 713 F.2d 416, 418 (8th Cir. 1983). The Supreme Court interpreted the term "willfully" alone as requiring the government to prove actual knowledge of the pertinent legal duty and to negate a defendant's claim of a good faith belief that he was not violating the law due to a misunderstanding of its requirements,
    Cheek v. United States, 498 U.S. ___, 112 L.Ed.2d 617, 111 S.Ct. 604 (1991). Although the holding was limited to criminal tax violations because the proliferation of tax law and regulations has made it difficult for the average citizen to know and comprehend the extent and duties imposed by tax laws, a similar argument might be made with reference to environmental statutes and regulations.

11. Since agents and attorneys most often rely on the CAA as codified in the United States Code, in particular as published by the West Publishing Company, the sections of

the CAA are referred to by the code headings, e.g., the CAA is Chapter 85 of the code and the different subject areas are addressed in subchapters, rather than the statutory headings, e.g., titles.

12. CAA §§ 101 - 131, 42 U.S.C. §§ 7401 - 7431.

13. CAA § 110(n), 42 U.S.C. § 7410(n).

14. CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1).

15. CAA § 111, 42 U.S.C. § 7411.

16. CAA § 111(c), 42 U.S.C. § 7411(c).

17. CAA § 129, 42 U.S.C. § 7429.

18. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2).

19. CAA § 112(b), 42 U.S.C. § 7412(b).

20. For example one type of HAP (Perchorethylene) generated by one source category (dry cleaning facilities) are the subject of this type of regulation. Other forthcoming regulations have a broader focus such as emissions of several hazardous air pollutants by the entire chemical manufacturing industry, which will added to Part 63 of 40 C.F.R.

21. CAA § 112(l)(1), 42 U.S.C. § 7412(l)(1) provides delegated state enforcement authority. CAA § 112(l)(7), 42 U.S.C. § 7412(l)(7) provides concurrent federal enforcement authority.

22. CAA § 112(h)(1), 42 U.S.C. § 7412(h)(1).

23. CAA §§ 202 - 250, 42 U.S.C. §§ 7521 - 7590.

24. CAA § 213, 42 U.S.C. § 7547.

25. CAA § 202, 42 U.S.C. § 7521, is not among the sections enumerated as being covered by the CAA criminal provision, CAA § 113(c)(1), 42 U.S.C. § 7413(c)(1).

26. CAA § 211(i),(k), 42 U.S.C. § 7545(i),(k).

27. 18 U.S.C. § 1001.

28. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2).

29. 40 C.F.R. § 86 et seq.

30. CAA §§ 401 - 416, 42 U.S.C. §§ 7651 - 7651o

31. CAA § 403(a)(1), 42 U.S.C. § 7651b(1)

32. CAA § 113(c)(2), 42 U.S.C. § 7413(c)(2).

33. CAA §§ 501 - 507, 42 U.S.C. §§ 7661 - 7661f.

34. 40 C.F.R. § 70.6(c)(1).

35. 40 C.F.R. § 70.5(d).

36. States agencies administering EPA approved CAA permit programs are required to have adequate enforcement authority. Acceptable state criminal penalties can be as little as a maximum $10,000 fine, however, with no imprisonment, 40 C.F.R. § 70.11.

37. CAA § 113(a)(1), 42 U.S.C. § 7413(a)(1).

38. CAA §§ 601 - 618, 42 U.S.C. §§ 7671 -7671q.

39. Pursuant to CAA § 602(c), 42 U.S.C. § 7671a(c), the EPA Administrator on January 18, 1993 added methyl bromide to the list of Class I ozone-depleting chemicals. This chemical substance is the principal ingredient of a extensively used pesticide. Its production and importation will be phased out by the year 2000. Indicative of the multi-media approach to environmental protection, the use of this pesticide will be phased out under the CAA rather than canceling its registration because of its adverse effects on the environment under FIFRA § 6(b), 7 U.S.C. § 136d(b).

40. CAA § 608(c), 42 U.S.C. § 7671g(c).

41. CAA § 609, 42 U.S.C. § 7671h.

42. 40 C.F.R. Part 82.